

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules – Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
to Engage in Fixed Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74 of the)	WT Docket No. 02-68
Commission's Rules With Regard to Licensing)	RM-9718
In the Multipoint Distribution Service and the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	

To: The Commission

**REPLY COMMENTS
OF
BELLSOUTH CORPORATION AND BELLSOUTH WIRELESS CABLE, INC.**

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October 23, 2003

Summary

The Commission's wide-ranging proposals in this proceeding present an opportunity to dramatically re-shape the regulatory and business environment and enable the MMDS and ITFS spectrum to be a platform for competition, innovation and investment in wireless services. The public has responded with enthusiastic support for many of the Commission's proposals.

First, BellSouth and a consensus of commenters overwhelmingly demonstrated that the industry coalition's proposals to segment the MMDS and ITFS spectrum and transition to the new band plan would offer superior public interest benefits. In particular, commenters from all parts of the MMDS/ITFS industry united in recognizing that the Coalition Plan would provide the best balance of new, innovative and competitive advanced services and the preservation of high-power, high-site operations to accommodate existing video operations. Band plans offered by others, particularly those that propose an across-the-board power reduction, jeopardize the flexibility of the Coalition Plan and may well lead to termination of some ITFS and rural video operations that require higher power levels. In addition, the Coalition's proposal to transition to the re-configured spectrum plan is based on market principles, and is favored over arbitrary "date-certain" transition plans.

Second, BellSouth showed that, consistent with well-defined legal standards, precedent and policy, the Commission should not impose restrictions on the ability of digital subscriber line ("DSL") providers to hold MMDS and ITFS spectrum rights. Opposing viewpoints were marked with premature assumptions about the geographic and product markets for the services to be offered on the re-configured spectrum and a failure to appreciate the competitive benefits that DSL providers could bring. As stated in the BellSouth Comments, "[a]t the present time, there is no product market or geographic market for the rebanded MMDS and ITFS spectrum, only a

nascent marketplace with unproven technology, unknown geographic and product markets and untested business cases.”

Third, all but one commenter rejected the suggestion that unlicensed devices should be permitted to operate in the MMDS and ITFS spectrum on an underlay basis, agreeing with BellSouth that the uncertain interference environment and the lack of any testing precluded the creation of an underlay. Moreover, the proposal to re-allocate ITFS spectrum is outside the scope of this proceeding and contrary to the Commission’s policy objectives.

Commenters also joined in showing strong support for a “substantial service” performance requirement, with appropriate “safe harbors.” Alternative proposals to re-cast the construction benchmarks would merely replace one set of rigid requirements with another, and lead to greater uncertainty in the marketplace.

BellSouth further urges the Commission to promote additional flexibility for ITFS licensees. The Commission should reject a proposal to raise the five percent minimum educational use requirement, thereby preserving the right and ability of ITFS licensees to freely contract with their commercial partners and enjoy operational flexibility. BellSouth joins those parties urging the Commission to permit ITFS licensees to have the right to sell their licenses to commercial entities. Expanding ITFS eligibility would afford ITFS licensees additional flexibility to fulfill their educational mission and provide additional incentives for investment that benefits education.

The Commission also should dismiss the suggestions offered by a few commenters that would require existing leases to be terminated or renegotiated when new rules become effective. Such a proposal is outside the scope of this proceeding, would disturb existing relationships between lessors and lessees and undermine confidence in the secondary market.

By adopting the Coalition Plan, and by taking the other actions BellSouth advocates in its Comments and Reply Comments, the Commission can achieve the public interest objectives of this proceeding.

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**REPLY COMMENTS
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BELLSOUTH CORPORATION AND BELLSOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and its wholly-owned subsidiary BellSouth Wireless Cable, Inc. (collectively, "BellSouth") hereby submit Reply Comments in the above-captioned proceeding.¹

Introduction

In the *NPRM*, the Commission recognized that changes in technology and potential uses of the MMDS/ITFS spectrum "present a significant opportunity to provide alternatives for the

¹ See *Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 03-56, 18 FCC Rcd 6722 (2003) ("*NPRM*").

provision of broadband services to consumers in urban, suburban and rural areas.”² More than 50 parties, including BellSouth,³ filed Comments in this proceeding, demonstrating great interest in this opportunity.

On several issues, commenters agree on how the new regulatory regime should be fashioned. For instance, every party addressing the issue concurred with the Coalition and BellSouth that the Commission should de-interleave the MMDS and ITFS channels⁴ and should streamline the application process.⁵ The vast majority of commenters also favor the Commission adopting geographic area licensing⁶ and a “substantial service” performance requirement.⁷ Significantly, all but one commenter urge the Commission to refrain from allowing unlicensed Part 15 devices to operate in the MMDS/ITFS band on an underlay basis.⁸

BellSouth⁹ and others¹⁰ showed that imposing restrictions on the ability of digital subscriber line (“DSL”) providers to hold MMDS and ITFS spectrum rights would be contrary to well-defined legal standards, precedent and policy, and thus should not be adopted. As discussed

² *Id.*, ¶1.

³ See Comments of BellSouth Corporation and BellSouth Wireless Cable, Inc., filed September 8, 2003 (“BellSouth Comments”).

⁴ See, e.g., Comments of the Wireless Cable Association International, Inc., the Catholic Television Network and the National ITFS Association (“Coalition Comments”), pp.24-25; Comments of Ericsson Inc (“Ericsson Comments”), pp.3-4; Comments of Intel Corporation, p.3; Comments of IPWireless, Inc. (“IPWireless Comments”), p.3; Comments of Motorola, Inc. (“Motorola Comments”), pp.10-13; Comments of NTELOS Inc. (“NTELOS Comments”), p.2.

⁵ See, e.g., Coalition Comments, pp.141-144; Comments of Blooston, Mordkofsky, Dickens, Duffy and Prendergast (“Blooston Comments”), p.6; Comments of Independent MMDS Licensee Coalition (“Independent MMDS Comments”), pp.8-11.

⁶ See, e.g., Comments of the Ad Hoc MMDS Licensee Consortium (“Ad Hoc MMDS Comments”), pp.13-14; Blooston Comments, pp.3-4; Comments of ComSpec Corporation (“ComSpec Comments”), p.2; Comments of EarthLink, Inc. (“EarthLink Comments”), p.7; IPWireless Comments, p.11; Comments of Virginia Communications, Inc., p.2.

⁷ See, e.g., Blooston Comments, pp.4-5; EarthLink Comments, p.9; Comments of Hispanic Information and Telecommunications Network, Inc. (“HITN Comments”), p.8; Comments of Sprint Corporation (“Sprint Comments”), pp.16-18.

⁸ See Part III, *infra*.

⁹ See BellSouth Comments, pp.14-25.

¹⁰ See Coalition Comments, pp.118-128; Comments and Reply Comments of Network for Instructional TV, Inc. (“NITV Comments”), p.7; Sprint Comments, pp.22-23.

below, commenters advocating such restrictions¹¹ provide no basis for the Commission to waver from this position or to disregard the clear competitive benefits that would result from continued DSL eligibility.

Though a majority of commenters favor the Coalition Plan, certain commenters propose band plans that differ from the compromise plan proposed by the Coalition (the “Coalition Plan”).¹² Likewise, commenters’ views diverge on whether commercial entities should be eligible to hold ITFS licenses.¹³ A few commenters ask the Commission to terminate existing capacity leases or require their renegotiation upon adoption of new rules in this proceeding.¹⁴

In these Reply Comments, BellSouth will further demonstrate that the band segmentation and transition features of the Coalition Plan would provide public interest benefits superior to those plans offered by others. Consistent with the public policy objectives of this proceeding, BellSouth also urges the Commission to facilitate additional flexibility for the ITFS service by not raising the five percent minimum educational usage reservation and by permitting commercial entities to hold ITFS licenses. BellSouth also will show that terminating or requiring renegotiation of existing spectrum leasing arrangements would deprive contracting parties of the benefits obtained through the leasing relationship, destroy value from the assets of each and undermine confidence in the secondary market.

¹¹ See Ad Hoc MMDS Comments, p.21; Comments, Erratum of Grand Wireless Company, Inc. – Michigan (“Grand Wireless Comments”), pp.11-12; EarthLink Comments, pp.16-18; Comments of PACE Telecommunications Consortium of Michigan (“PACE Comments”), p.7; Comments of Teton Wireless Television, Inc. (“Teton Comments”), pp.6-7.

¹² See “A Proposal for Revising the MDS and ITFS Regulatory Regime,” submitted by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network, RM-10586 (filed October 7, 2002) (the “Initial Coalition Proposal”). The Coalition further supplemented the Initial Coalition Proposal through its First Supplement in RM-10586 (filed November 14, 2002), its Reply Comments (filed November 29, 2002) and its Second Supplement (filed February 7, 2003). These filings will be collectively referred to herein as the “Coalition Plan.”

¹³ See Part V.B., *infra*.

¹⁴ See Comments of Spectrum Market, LLC (“Spectrum Market Comments”), pp. 13-16; Ad Hoc MMDS Comments, pp.25-27; Independent MMDS Comments, pp.23-25.

Discussion

I. THE COALITION PLAN REMAINS THE BEST MEANS BY WHICH THE COMMISSION'S PUBLIC INTEREST OBJECTIVES WILL BE REALIZED.

A. The Band Segmentation Plan Would Enable Rapid Deployment Of Advanced Services And Preserve High-Power Operations.

The linchpin of this proceeding is the Coalition's comprehensive plan to de-interleave the MMDS and ITFS channels and to segment the 2500-2690 MHz spectrum band into two low-power segments (the "Lower Band Segment" ("LBS") and the "Upper Band Segment" ("UBS")) and one high-power segment (the "Mid Band Segment" ("MBS")). Without exception, every commenter addressing the issue supports de-interleaving of the channels in recognition of the inherent and profound difficulties that the current channel assignment system creates for spectrum aggregation and interference coordination.¹⁵

The vast majority of commenters agree with BellSouth that adopting the Coalition Plan would provide the best vehicle for the Commission's public interest goals to be achieved.¹⁶ Notably, support for the Coalition Plan came from all quarters – MMDS operators, ITFS licensees, equipment vendors and trade associations. This broad consensus reflects the compromise struck by the Coalition members and the benefits of a band plan that, while admittedly not perfect for each individual situation, facilitates opportunities for the industry as a

¹⁵ See, e.g., Comments of Hardin and Associates, Inc. ("Hardin Comments"), pp.2-3 (noting that "the cooperation of at least two or more licensees is necessary to move forward in a market. Licensees can hold each other hostage or hold a system operator hostage using the interleaving and interference protection requirements"). Dallas MDS Partners proposes that only the E- and F-Group channels be de-interleaved and that licensees on the adjacent ITFS D4 and G1 channels be required to protect so-called "3G" services on the E- and F-Groups. See Comments of Dallas MDS Partners, pp.4-6. Not only is this partial de-interleaving plan unfair to ITFS, it would also create spectrum aggregation difficulties, limit the ability of multiple operators to make efficient use of the MMDS/ITFS spectrum and eliminate the ability to deploy FDD technologies.

¹⁶ See BellSouth Comments, pp.6-10. See also Reply Comments of CelPlan Technologies, Inc. ("CelPlan Reply Comments"), p.2 ("[r]eflecting the substantial efforts undertaken by the three industry representative organizations, the Coalition Proposal presents the best possible compromise among a variety of competing considerations").

whole to provide an array of new and competitive advanced wireless services.¹⁷ The benefits of the Coalition's band segmentation plan include the following:

- preservation of high-power, high-site operations to accommodate existing video operations without the expenditure of substantial, scarce and, in some cases, public, resources to reconfigure systems to maintain such ongoing operations;¹⁸
- operation in an environment substantially less likely to suffer from adjacent-channel and co-channel interference;¹⁹
- more rapid deployment of services resulting from eliminating the need for adjacent-channel interference consents and the corresponding ability of licensees to delay or withhold from providing such consents;²⁰ and

¹⁷ Though they generally agree with the Coalition's band plan, two commenters offer variations in the amount of spectrum that could be allocated to the MBS. Illinois Institute of Technology favors a plan that would vary the amount of MBS spectrum depending on the specific desires of licensees. *See* Comments of Illinois Institute of Technology ("IIT Comments"), pp.18-19. While this plan has maximum flexibility, spectral efficiency would suffer and systems would not be deployed as rapidly. This plan would create numerous interference coordination problems as systems with a larger amount of MBS spectrum attempted to co-exist with systems with little or no MBS spectrum, creating opportunities for "greenmail" and potentially rendering some channels unavailable for use. It is unclear from the IIT Comments how this variable channelization plan would be incorporated into the transition process. Stanford University and Northeastern University suggest in their Joint Comments that the number of MBS channels be increased to ten (as opposed to seven in the Coalition Plan) to ensure that there is sufficient spectrum for high-power use. *See* Joint Comments of Stanford University and Northeastern University ("Stanford/Northeastern Comments"), p.10. This plan begs the obvious question of how the three additional MBS channels would be assigned; under the Coalition Plan, each of the seven four-channel licensees would be licensed for one 6 MHz MBS channel. Stanford/Northeastern offer no solution to resolve this discrepancy.

¹⁸ *See* NITV Comments, p.10 (Coalition band plan "represents the best way to preserve incumbent operations and allow for the development of new technologies for the provision of wireless broadband services that will benefit education"); Reply Comments of California Amplifier, Inc., p.2 ("the proposed set of rules will lead to usable spectrum for the intended purposes of deploying competitive broadband services, while protecting existing video services"); Comments of W.A.T.C.H. TV Company, p. 3 ("it plainly would be inequitable for the Commission to now reverse field and nullify W.A.T.C.H. TV's efforts and multimillion dollar investment to promote a cellular paradigm for MDS/ITFS service"); Comments of South Carolina Educational Television Commission ("SCETV Comments"), p.5 ("[t]he high power spectrum would allow for a big pipe one-way delivery of videos that are requested off the server"); Comments of the National Telecommunications Cooperative Association ("NTCA Comments"), p.3 ("[t]he ability to transmit signals across long distances . . . is especially important in a rural environment where over the air reception is unavailable and low customer density makes it uneconomical to deploy a large number of sites or to string cable to serve just a few customers"); Comments of the Diocese of Brooklyn ("Brooklyn Comments"), p.2 ("[i]t would not be practical or economically feasible for the Diocese to convert its existing high site, high power video operations to cellular network technology"); Comments of the Archdiocese of New York ("New York Comments"), p.3 (same).

¹⁹ *See* EarthLink Comments, p.6.

²⁰ *See* BellSouth Comments, p.12 ("[t]o implement any technical change, under the current interleaved band plan and technical rules, numerous interference consents would need to be obtained, affording recalcitrant licensees the opportunity to unnecessarily stymie other licensees' efforts to improve service"); Sprint Comments, pp.5-6 (Coalition Plan's "LBS and UBS structure ensures that Sprint can deploy TDD, FDD, or non-synchronized TDD services without being subjected to deployment-stifling greenmail or interference from spectral neighbors").

- flexible use of the spectrum,²¹ including the expansion of educational services²² and the ability to switch from one technology to another.²³

The band plans proposed by other parties do not offer similar, well-balanced public benefits, and in some cases are transparent proposals that would serve the private interests of only a few.

ArrayComm Proposal

While it agrees with the spectrum segmentation portions of the Coalition Plan, ArrayComm, Inc. (“ArrayComm”) proposes to designate certain portions of the LBS and UBS for either paired or unpaired use.²⁴ This plan tries to address the interference potential that would arise where TDD and FDD systems are operating on the same frequencies in nearby markets. But in attempting to address this possibility, ArrayComm would undermine one of the chief benefits of the Coalition Plan – ensuring the ability of a licensee to switch from TDD to FDD (and vice versa) to enable each operator to most efficiently utilize its spectrum assets to satisfy consumer demand for services. The ArrayComm plan also may not be able to accommodate multiple users of the same technology in the same market, and would limit an

²¹ See CelPlan Reply Comments, p.2; Hardin Comments, p.4; NTELOS Comments, p. 2; Comments of The George Mason University Instructional Foundation, Inc., F Corporation and The Michael Kelley Revocable Trust, d/b/a Shannondale Wireless (“GMU Comments”), p.4 (noting “true flexibility” in response to “marketplace needs”); HITN Comments, p. 8 (Coalition Plan would “minimize the number of guardbands needed and allow for the largest number of possible network designs”).

²² See Comments of the School Board of Miami-Dade County, Florida, p.5 (Coalition band plan and technical rules offer “a new opportunity to expand and extend educational services”); Comments of the Archdiocese of Los Angeles, pp.2-3 (Coalition Plan will enable Archdiocese to use an “enhanced ITFS system” that will “reduce the unit cost of educating students, enhance available curriculum and have a continuing source of funding to support these efforts”).

²³ See CelPlan Reply Comments, p.5; Reply Comments of Blake Twedt and John Dudeck (“Twedt/Dudeck Reply Comments”), pp.2,3; Reply Comments of Gryphon Wireless L.L.C. (“Gryphon Reply Comments”), p.2; Hardin Comments, p.4; Sprint Comments, pp.5-6.

²⁴ See Comments of ArrayComm, Inc. (“ArrayComm Comments”), pp.6-9. Under the ArrayComm plan, paired licenses would be assigned from the lowest frequency up (or the highest frequency down), unpaired licenses would be assigned from the highest frequency down (or lowest frequency up). Though the details of the ArrayComm proposal are noticeably absent, one envisions a “spectrum draft” where an operator would select its technology and then elect the spectrum it wants.

operator's ability to acquire additional compatible spectrum in the future, as capacity needs and service objectives change. Accordingly, the Commission should reject ArrayComm's plan.

FWH, NextNet, Grand Alliance, Spectrum Market and IMWED Proposals

Five commenters suggest that the Commission simply reduce power limits across the board.²⁵ NextNet claims that the presence of high-power systems has "severely hindered full-scale deployment of low-power systems,"²⁶ and Grand Alliance argues that use of the MMDS/ITFS band for high-power video is "both inefficient and of diminishing value."²⁷ IMWED also supports an across-the-board power reduction, claiming that the Coalition Plan would frustrate the ability of licensees in the MBS to locate available sites for high-power transmitters, forcing MBS channels to go dark and jeopardizing ITFS licenses.²⁸

These views, however, miss the point. It is not the presence of high-power systems that has slowed deployment of low-power systems, but rather an antiquated regulatory regime that is ill-equipped to accommodate the nationwide development of low-power systems using FDD or TDD technology. Likewise, it is the regulatory structure that has contributed greatly to any perceived spectral inefficiencies and decline in spectrum value. And as the LBS and UBS channels are transitioned to a low-power, cellularized configuration, it can be expected that existing transmit sites can be maintained for the MBS channels, without any need to relocate. Even so, the individually-licensed nature of the seven MBS channels presents no greater relocation challenges than is now the case with the existing 31 interleaved MMDS and ITFS

²⁵ See Comments of Fixed Wireless Holdings, LLC, pp.5-7 (proposing two blocks of spectrum designated as FDD (15 5.5 MHz channels plus one 4 MHz channel) separated by a TDD block (16 6 MHz channels); Comments of NextNet Wireless, Inc. ("NextNet Comments"), p.3; Comments of Grand MMDS Alliance New York F/P Partnership ("Grand Alliance Comments"), pp.6-7; Spectrum Market Comments, pp.11-13; Comments of ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED Comments"), pp.11-14.

²⁶ NextNet Comments, p.3.

²⁷ Grand Alliance Comments, p.6. See also Spectrum Market Comments, pp.11-13.

²⁸ See IMWED Comments, p.15.

channels.

These plans also do not offer anywhere near the flexibility that the Coalition Plan code. Licensees and operators do not know the extent to which FDD and TDD technology will be deployed or how those technologies will operate under different market conditions. If it were to set aside a certain amount of spectrum for each, as at least NextNet and FWH propose,²⁹ the Commission would be establishing artificial limits and arbitrarily denying licensees and operators the decision to make market-based technology and coordination choices. As CelPlan states, “[n]ot only might those restrictions disrupt existing deployments or business plans, but they might preclude licensees from deploying altogether if demand for TDD- or FDD-based services does not match the allocation.”³⁰

Moreover, an across-the-board reduction in the power limit would, as one commenter states, “effectively terminate all high power operations in due course, essentially ending ITFS as it currently exists.”³¹ ITFS licensees would face the unenviable decision to reduce service,³² expend large sums of money on cell sites, networking equipment and site acquisition to provide the same service using lower power, or cease transmitting altogether because the conversion costs would be prohibitive.³³ In addition to the educational community, subscribers to high-

²⁹ It is unclear what spectrum assignment plan Grand Alliance and Spectrum Market are proposing. IMWED proposes full interleaving and alphabetizing of the MMDS and ITFS channels.

³⁰ CelPlan Reply Comments, p.5. *See also* Gryphon Reply Comments, p.4 (FWH and NextNet band plans would prevent Gryphon from deploying TDD technology on certain ITFS channels in its system).

³¹ IIT Comments, p.16. *See also* NITV Comments, p.9 (“such power reductions would necessitate the shutdown of successful video in the band, cause serious service disruptions and require uneconomical expenditures to convert some systems to low-power uses”); BellSouth Comments, p.10 (across-the-board power reduction “would virtually eliminate the ability of ITFS licensees to efficiently and economically serve their educational receive sites”). IMWED, which purports to represent the interests of ITFS licensees, curiously subjugates the benefits associated with continued high-power uses to the perceived spectral efficiencies attendant to a non-segmented band plan. *See* IMWED Comments, p.13.

³² *See* Comments of Education Service Center Region 10 (“Region 10 Comments”), pp.ii-iii (stating that a “modest” power reduction of 10 dB “would significantly reduce the service area to less than 5 miles” and that power reductions at PSA borders would “cause loss of service to receive sites”).

³³ *See* Brooklyn Comments, pp.1-2; Los Angeles Comments, p.2; New York Comments, pp.1-2; GMU Comments, p.11.

power MMDS/ITFS video services in rural areas could lose the only source of over-the-air video programming³⁴ or a source of competition to multi-channel video programming services if power limits were reduced across-the-board.³⁵ For these reasons, the Commission should reject those proposals that would reduce power limits across the board.

Grand Wireless and PACE Proposals

Grand Wireless and PACE propose to segment the band in the manner proposed by the Coalition, but would divide the three low-power channels between the LBS and UBS instead of grouping all three channels in either segment.³⁶ According to these commenters, this channel plan would allow licensees to construct at least one channel pair, and would rely on licensee cooperation “to decide where their channels will be located.”³⁷

This plan suffers from several flaws. For each licensee, it creates a maximum of only 11 MHz of contiguous spectrum for unpaired or TDD operation, and only 5.5 MHz of segregated spectrum for paired or FDD operation. In either case, unless a licensee reaches private agreements on an intra-market and, with respect to interference coordination, inter-market basis, the licensee likely would lack sufficient spectrum.

The Grand Wireless/PACE proposal also would inhibit rapid deployment of service and create spectral inefficiencies. An operator using TDD technology would likely transmit on the 11 MHz block, thereby marooning the paired 5.5 MHz channel.³⁸ Similarly, an operator using FDD technology would only be able to pair 11 MHz of spectrum, effectively stranding 5.5

³⁴ See NITV Comments, p.9; Comments of Oklahoma Western Telephone Company, Inc., p.3.

³⁵ See NTCA Comments, pp.3-4; Teton Comments, pp.9-10; Grand Wireless Comments, p.6.

³⁶ See Grand Wireless Comments, p.5; PACE Comments, p.4. To illustrate, Channels A1 and A2 would be placed in the LBS, Channel A3 would be placed in the UBS and, as proposed by the Coalition, Channel A4 would be placed in the MBS.

³⁷ Grand Wireless Comments, p.5.

³⁸ See Gryphon Reply Comments, p.9 (stating that 11 MHz of contiguous spectrum “is insufficient to meet marketplace demand in even Gryphon’s rural market, and significant additional costs . . . would be imposed on the

MHz.³⁹ Simply relying on licensees to “work it out” perpetuates the current situation where licensees, by refusing to negotiate or making unreasonable demands, can thwart the deployment of advanced wireless systems in a market. The Commission should not adopt the Grand Wireless/PACE band plan for these reasons.

NAF Proposal

The New America Foundation, *et al.* (“NAF”) seeks re-allocation of 90 MHz of ITFS spectrum for primary unlicensed operations, with bands of 48 MHz for MMDS/ITFS low-power operations and 42 MHz for high-power MMDS/ITFS operations.⁴⁰ Existing ITFS licensees affected by the re-allocation would either be grandfathered or given incentives to vacate their licensed spectrum,⁴¹ and those licensees that do not relocate would not have their licenses renewed.⁴²

The NAF plan would turn Commission policy upside down and should be dismissed.⁴³ It would be contrary to the public interest for the Commission to license spectrum for “exclusive

system to either add the non-contiguous 5.5 MHz available to the licensee in the UBS or to add additional cells to increase frequency reuse”).

³⁹ *Id.*, p.10 (“additional spectrum in the LBS likely would go unused in FDD systems”).

⁴⁰ See Comments and Erratum of The New America Foundation, *et al.* (collectively, “NAF Comments”), pp.16-17. See also Comments of Joshua Kronengold, p.1 (proposing in conclusory terms re-allocation of “relicensed bandwidth” for “truly unlicensed” use).

⁴¹ See NAF Comments, pp.17-18.

⁴² *Id.*, p.19. NAF concedes that relocation may need to wait until the end of the existing license term. This “solution” totally ignores the fact that ITFS licenses typically run for ten years from the date of grant or renewal, meaning that the relocation process could last as long as ten years and would occur on a license-by-license basis. Aside from the other fatal infirmities of NAF’s re-allocation/relocation plan discussed *infra*, this administrative nightmare alone is reason enough for the Commission to reject it.

⁴³ Moreover, the Commission would be violating the Administrative Procedure Act (“APA”) if it were to adopt NAF’s spectrum re-allocation scheme. See 5 U.S.C. §551, *et seq.* Pursuant to Section 553 of the APA, the Commission must give appropriate notice of rules it is considering changing in the proceeding. In the *NPRM*, the Commission discussed several alternatives by which spectrum in the 2500-2690 MHz band could be assigned to licensees, and sought comment on whether it should allow unlicensed operations on a primary basis in unassigned ITFS “white areas” or when ITFS licensees return their licenses to the Commission, but never once raised the prospect that *existing* ITFS licensees could face re-allocation of their licensed spectrum for unlicensed use. See *NPRM*, ¶¶49-57, 82. Indeed, the opposite is true – throughout the *NPRM*, the Commission signaled its intent to afford ITFS licensees greater flexibility to use their licensed spectrum, an objective that obviously is inconsistent with re-allocating 75 percent of ITFS spectrum for unlicensed use. As examples, the Commission stated as follows:

use” by educators and then require that licensed spectrum to be converted to unlicensed operations. It would be contrary to the public interest for licensees that are complying with the rules and want to retain their licensed spectrum to have that spectrum taken away. It would be contrary to the public interest for the Commission to say it wants to promote spectrum-based educational opportunities and then re-allocate that spectrum for unlicensed use. It would be contrary to the public interest for the Commission to replace licensed spectrum with the interference problems associated with multiple operators of unlicensed spectrum. It would be contrary to the public interest for the Commission to not renew a license, where the licensee has complied with Commission rules, in order to clear the band for unlicensed operations.⁴⁴

Fairly considered, the alternative band plans, power reduction proposals and spectrum re-allocation schemes would not achieve the public interest benefits embodied in the Coalition Plan. The Coalition Plan appropriately balances the interests of consumers who desire high-power ITFS services and consumers who desire low-power advanced wireless services, and preserves flexibility in a spectrally-efficient manner. In sum, the Coalition Plan would confer far superior

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- “We do not propose to reclaim licenses from any incumbent operators that have complied with our existing rules and continue to comply with our rules when we change them or adopt new ones.” *NPRM*, ¶46.
 - “[W]e do not intend to evict any incumbent licensees from the affected band if they have been in compliance with our rules and continue to comply with our rules when we modify or augment them nor do we intend to undermine the educational mission of ITFS licensees. Far from evicting licensees, we anticipate that the streamlined regulations and revised spectrum plan adopted in this proceeding will facilitate the provision of advanced wireless communications services by incumbent licensees.” *NPRM*, ¶2.

Because the Commission in this proceeding did not provide notice that it would consider re-allocating licensed ITFS spectrum for unlicensed use, it lacks the legal basis to take the action requested by NAF.

⁴⁴ The Commission apparently has concerns about NAF’s spectrum re-allocation plan as well as its unlicensed underlay proposal discussed in Part III, *infra*. See Letter dated October 22, 2003 from Harold Feld, Associate Director, Media Access Project, to Marlene H. Dortch, Secretary, FCC (providing notice of an October 21, 2003 *ex parte* presentation in this proceeding).

benefits on the public as a whole, promoting competition, innovation, investment and educational services.⁴⁵ The Commission thus should adopt the Coalition Plan.

B. The Coalition's Transition Plan Would Strike The Appropriate Balance Between Proponents Of Advanced Services And Incumbents Desiring To Continue Existing Services.

The Coalition Plan includes a detailed proposal by which proponents of advanced services can transition to the new band plan.⁴⁶ This plan would facilitate a market-by-market transition to a system capable of providing advanced services in accordance with the new band plan. To implement a transition, a proponent would bear certain costs of ITFS licensees in the same or nearby market to alter their facilities if the reconfigured system would run afoul of the Commission's interference protection standards.

In the *NPRM*, in addition to seeking comment on the Coalition's transition plan, the Commission also requested input on whether a date-certain transition would be less complicated and thus would expedite the provision of advanced wireless services to the public.⁴⁷ Several parties filed Comments in support of this concept, while several others demonstrated support for the Coalition's transition plan. Based on its review of the record, BellSouth believes that the Coalition's transition plan offers superior public interest benefits.

Commenters urging a "flash-cut" transition favor perceived simplicity in implementing the transition over responsiveness to consumer demand in the marketplace. But, strikingly, there is no consensus among these commenters on how or when the date-certain transition would occur – the suggestions range from 15 months to seven years.⁴⁸ This vast disparity of opinion on

⁴⁵ See *NPRM*, ¶1.

⁴⁶ See Initial Coalition Proposal, Appendix B, p.1; Coalition Comments, pp.35-36.

⁴⁷ See *NPRM*, ¶¶100-101.

⁴⁸ See Grand Wireless Comments, pp.9-11 (proposing transition within 15 months following release of order in this proceeding); IPWireless Comments, pp.11-12 (proposing transition period of two years or less); Grand Alliance Comments, pp.7-8 (proposing transition within two to five years); IIT Comments, p.23 (proposing transition within five years); Spectrum Market Comments, pp.7-8 (proposing January 2008 sunset date for non-conforming

the timing of the transition illustrates the Coalition’s point that the transition plan should be “market-driven; until someone (one of the many potential Proponents for a given market) determines that marketplace conditions call for a transition, the *status quo* continues.”⁴⁹

Transitions would occur when the proponent determines that consumers *in a given market* want advanced services and the proponent is willing to take the steps necessary to meet consumer demand. By contrast, the date-certain transition proposed by commenters in this proceeding – whenever it would occur – would be too soon in some markets and too late in others. Imposing an artificial time limit would be inconsistent with the market-based objectives of this proceeding.

II. THE COMMISSION SHOULD REJECT PROPOSALS THAT WOULD RESTRICT DSL PROVIDERS FROM HOLDING MMDS AND ITFS SPECTRUM.

Citing a standard rooted in the Communications Act of 1934, as amended, and applied in other rule making proceedings, the Commission stated that “eligibility restrictions should be imposed *only* when (1) there is a *significant likelihood of substantial competitive harm in specific markets*, and, (2) only when eligibility restrictions are an *effective way to address such harm*.”⁵⁰

Those conditions are not met here, and the Commission should not impose any blanket restrictions on the eligibility of any class of companies to hold MMDS and ITFS spectrum. Rather than adopting an *a priori* restriction, the Commission should, as suggested by BellSouth, the Coalition and Sprint, review any proposed acquisition of MMDS and ITFS spectrum on a case-by-case basis, examining the specific facts and circumstances of the market or markets involved, to determine whether that particular transaction would promote the public interest,

operations, followed by a conversion period of at least six months); and Stanford/Northeastern Comments, pp.16-18 (proposing seven-year transition plan).

⁴⁹ Coalition Comments, pp.36-37. See also Twedt/Dudeck Reply Comments, pp.3-4.

⁵⁰ NPRM, ¶121, citing 47 U.S.C. §151 (emphases added). See also Coalition Comments, p.120 (reasons for imposing eligibility restrictions under two-part standard must be “compelling”); Sprint Comments, pp.22-23 (no significant likelihood of competitive harm)

convenience and necessity, or whether it would lead to an impermissible lessening of competition in a particular market.⁵¹ At this juncture, one cannot predict that all such acquisitions would be impermissible, and, in fact, it appears that many such acquisitions would promote the public interest.

In its Comments, BellSouth demonstrated that the Commission in this proceeding lacks the legal authority to impose eligibility restrictions on DSL providers as a class, and also explained that retaining the current “open eligibility” standards would advance the public interest, to-wit:

- DSL providers could offer service to consumers in rural areas where broadband services are not available or where only one broadband service is offered without competitive choice;⁵²
- DSL providers could offer service where technological limitations preclude their ability to offer service on existing wireline networks;
- DSL providers, which do not control the broadband market, would have strong incentive to use the spectrum and develop innovative and flexible services;
- DSL providers have expertise to rapidly and efficiently construct and operate advanced wireless systems; and
- DSL providers could be active “secondary market” participants, thereby furthering other Commission policy objectives.⁵³

In their Comments, the Coalition, Sprint, CTIA and NITV agree, citing the Commission’s policies favoring open eligibility,⁵⁴ competition and flexibility,⁵⁵ highlighting the substantial

⁵¹ See BellSouth Comments, pp.24-25; Coalition Comments, pp.124-125; Sprint Comments, p.23.

⁵² See also Coalition Comments, pp.120-121; Sprint Comments, p.22-23.

⁵³ See BellSouth Comments, pp.23-24.

⁵⁴ See Coalition Comments, pp.118-120; Comments of the Cellular Telecommunications & Internet Association (“CTIA Comments”), p.5 (urging the Commission to “let the market determine the most efficient use” of the MMDS/ITFS spectrum).

⁵⁵ See NITV Comments, p.7 (explaining that DSL eligibility “would promote service to the public by increasing the pool of entrants” and that “structural prohibitions on eligibility are unduly restrictive in the current marketplace and that the streamlined rules would reduce incentives to warehouse spectrum by promoting certainty and flexibility and by allowing operators to offer services more quickly in response to consumer demand”).

investment that DSL providers have already made in the MMDS/ITFS spectrum,⁵⁶ and noting the chilling effect that eligibility restrictions would have on investment in rural markets.⁵⁷

A few commenters nevertheless suggest that the Commission should restrict DSL providers from holding MMDS and ITFS spectrum rights.⁵⁸ In every case, their Comments merely contend that the acquisition of MMDS or ITFS spectrum by DSL (or cable providers) may be a problem. This is not a sufficient showing for the Commission to impose a blanket *a priori* restriction on the holding of licenses by DSL or cable providers. Moreover, many of their assertions are wrong or simply speculative.

As the basis for its argument, EarthLink cites the Commission's statement that the "broadband internet market is very highly concentrated,"⁵⁹ adding that cable modem and DSL service accounts for over 90 percent of the existing and foreseeable residential broadband service market.⁶⁰ From these two statements, EarthLink concludes that "allowing a cable operator or ILEC to own or control MDS or ITFS spectrum that would otherwise be used by a competitor to provide a 'third pipe' competing broadband service within the cable operator's or ILEC's service area will substantially lessen competition."⁶¹

There are numerous infirmities with this claim. First, EarthLink wrongly assumes that the relevant geographic market is national and that the relevant product market is fixed residential broadband. As BellSouth explained in its Comments, the geographic and product markets cannot yet be defined:

⁵⁶ See Coalition Comments, p.126.

⁵⁷ *Id.*, pp.123-124.

⁵⁸ Some of these commenters also seek to exclude cable operators and CMRS providers from holding MMDS and ITFS spectrum rights. See EarthLink Comments, pp.15-18; Teton Comments, pp. 6-7; Ad Hoc MMDS Comments, p.21.

⁵⁹ EarthLink Comments, p.15, *citing NPRM*, ¶123.

⁶⁰ *Id.*, p.16.

⁶¹ *Id.*

At the present time, there is no product market or geographic market for the rebanded MMDS and ITFS spectrum, only a nascent marketplace with unproven technology, unknown geographic and product markets and untested business cases. The MMDS and ITFS spectrum may be used for a variety of services – fixed and portable – in a variety of markets – urban or rural, residential or commercial – and those uses and markets may evolve and change over time. For instance, in “fill-in” areas where DSL services cannot be provided, MMDS/ITFS operators may choose to provide fixed broadband services. In areas where both cable modem and DSL services compete, MMDS/ITFS operators may choose to serve specialized markets.⁶²

EarthLink’s assumption that the MMDS and ITFS spectrum will be used entirely for fixed residential broadband services is almost surely wrong or, at best, unsupported conjecture. If the spectrum is used for a mobile broadband solution, that service is likely to be sufficiently different from fixed broadband such that it should be treated as a separate relevant product. And EarthLink’s reliance on national penetration figures has no place in a discussion of the relevant geographic market, which should focus on the local area.⁶³ In many rural geographic markets, DSL providers have little or no presence – yet they would be among those most able to use the spectrum effectively to bring services to the public.

Second, in an effort to give credibility to its assumptions, EarthLink provides an economic analysis that purports to show that the acquisition of MMDS/ITFS spectrum by a DSL provider with 31 percent of the existing residential broadband market would result in an unlawful

⁶² BellSouth Comments, p.21. *See also* Coalition Comments, pp.120-121 (noting wide array of geographic and product markets that could be served and corresponding “speculative” nature of *a priori* eligibility restrictions); Sprint Comments, p.22-23 (noting inability to predict how the MMDS/ITFS spectrum would be used in a given market).

⁶³ *See, e.g.,* EchoStar Communications Corporation, *et al.*, *Hearing Designation Order*, 17 FCC Rcd 20,559 (2002), ¶119 (holding that the local market was the relevant geographic market for MVPD product market because “it would be prohibitively expensive for a customer to change his residence to avoid a ‘small but significant and nontransitory increase’ in price”). Assuming as EarthLink does that the relevant product market is residential broadband services, a similar analysis would be applied here. If the relevant product market were mobile services, the presence of incumbent CMRS providers would dramatically alter the economic analysis to account for the competitive mobile marketplace.

increase in market share under the *Merger Guidelines*.⁶⁴ But reliance on the *Merger Guidelines* is misplaced in this rule making proceeding. The *Merger Guidelines* are expressly designed for use in analyzing market conditions in the context of specific transactions, and are not intended to be used to support *a priori* ownership restrictions. In the preamble to the *Merger Guidelines*, the Department of Justice and Federal Trade Commission state that:

Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. Moreover, information is often incomplete and the picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines. Therefore, the Agency will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger.⁶⁵

Third, because the spectrum capacity needs for advanced services are anticipated to be substantially less than is required for video distribution purposes, allowing DSL providers to hold MMDS and ITFS spectrum rights does not necessarily preclude others from providing facilities-based services in the same market on MMDS/ITFS spectrum.

Similarly misplaced are the Teton Comments, which ask the Commission to “refrain from opening eligibility for MDS spectrum to cable and DSL interests [and] at a minimum . . . retain the cable/MDS cross ownership restrictions in rural markets where DSL and cable have a virtual lock on the broadband market.”⁶⁶ Teton misstates the existing rules, which already permit DSL providers to hold MMDS and ITFS spectrum rights, and which limit only cable companies – not DSL providers – from having certain ownership interests in MMDS and ITFS

⁶⁴ *Id.*, pp.17-18, citing 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission (“*Merger Guidelines*”), §1.51.

⁶⁵ *Id.*, §0.

⁶⁶ Teton Comments, pp.6-7.

spectrum.⁶⁷ Aside from these factual errors, Teton merely speculates that the product market for MMDS and ITFS will be fixed broadband, an assumption that cannot now be made with any degree of certainty.

Teton also incorrectly assumes that DSL providers would have the incentive and ability to warehouse spectrum and preclude entry.⁶⁸ As the Commission stated in its *39 GHz Order*, “given all these competitive possibilities, it is implausible that incumbent LECs would pursue a strategy of buying 39 GHz licenses in the hope of foreclosing or delaying competition, and implausible that they would succeed if that strategy were attempted.”⁶⁹ The same holds true here with respect to the nascent MMDS/ITFS market and the various advanced wireless services that are envisioned.

Grand Wireless and PACE each make somewhat conflicting arguments. On one hand, they suggest that cable and DSL operators may warehouse spectrum, stating that “cable and DSL with their substantial financial power may see their own wireless presence as a means to protect their existing business.”⁷⁰ BellSouth has already demonstrated that DSL providers do not have the incentive to purchase and warehouse spectrum, and would not be successful if they tried.⁷¹

On the other hand, Grand Wireless and PACE claim that their operations “would likely be impacted negatively” if cable and DSL operators were eligible to hold MMDS and ITFS

⁶⁷ See 47 C.F.R. §§21.912 and 74.931. BellSouth supports the Coalition’s position that the Commission, to the maximum extent possible, should eliminate rules preventing leasing of MMDS and ITFS capacity by cable operators and forbear from enforcing its cable/MMDS and cable/ITFS cross-ownership rules. See Coalition Comments, pp. 127-128.

⁶⁸ See also Grand Wireless Comments, p.11.

⁶⁹ Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18,600, ¶33 (1998), *recon. granted in part*, 14 FCC Rcd 12,428 (1999) (“*39 GHz Order*”). See also BellSouth Comments, pp.18-20.

⁷⁰ Grand Wireless Comments, p.11; PACE Comments, p.7. Grand Wireless and EarthLink also make mention of historical “anti-competitive” conduct by DSL providers. See Grand Wireless Comments, p.11; EarthLink Comments, pp.3-5. BellSouth obviously disagrees with this characterization, which has no relevance to the instant proceeding.

⁷¹ See BellSouth Comments, pp.18-20.

spectrum.⁷² To this, BellSouth would agree that its (and other DSL providers' or cable companies') presence in the market would offer meaningful competition to incumbent rural providers such as Grand Wireless. This, of course, is in the public interest and is consistent with the Commission's objectives, and makes the case for ensuring that DSL providers continue to have unrestricted access to MMDS and ITFS spectrum rights.

The Commission has the authority to evaluate each transaction on a case-by-case basis to determine whether it would further the public interest, convenience and necessity.⁷³ Taking this approach here would be consistent with the Commission's statutory obligations⁷⁴ and policies⁷⁵ and would afford the Commission an opportunity to define and examine the geographic and product markets that are relevant to any particular proposed transaction. Accordingly, given this authority and the failure of commenters to present any compelling evidence to the contrary, the Commission should not adopt an *a priori* restriction on the rights of DSL providers to hold MMDS and ITFS spectrum rights.

III. THERE IS VIRTUALLY NO SUPPORT FOR PERMITTING UNLICENSED USE OF MMDS AND ITFS SPECTRUM.

With only one exception,⁷⁶ no commenter supports the Commission's suggestion that unlicensed Part 15 devices should be permitted to operate in the 2500-2690 MHz spectrum band on an "underlay" basis. To the contrary, commenters agree with BellSouth that there are

⁷² *Id.*

⁷³ *Id.*, pp.24-25; Coalition Comments, pp.124-125; Sprint Comments, p.23.

⁷⁴ See 47 U.S.C. §310(d).

⁷⁵ See, e.g., 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22,668, *recon. pending* (2001). On October 6, 2003, the Commission consolidated the pending petitions for reconsideration into a different proceeding. See Facilitating the Provision of Spectrum-Based Services to Rural America and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Proposed Rulemaking*, FCC 03-22, released October 6, 2003.

⁷⁶ See NAF Comments, p.22.

numerous reasons why the Commission should refrain from adopting such rules.⁷⁷ Chief among these are the following:

- the potential for unlicensed devices to cause interference to licensed services by exceeding the “noise floor” or “interference temperature” limits with no ability to detect the source of the interference;⁷⁸
- unlicensed operations would increase burdens on licensees to detect or identify interference;⁷⁹
- difficulties in terminating service from the offending Part 15 device, assuming it can be detected;⁸⁰
- in the absence of any needed testing and analysis to determine the effect of unlicensed operations on licensed operations, it would be premature for the Commission to authorize such operations;⁸¹
- there is other spectrum available for unlicensed services, and no demonstrated need to allocate or permit unlicensed spectrum in other bands, especially those being used for licensed services;⁸²
- authorizing unlicensed devices in the 2500-2690 MHz band would compromise existing investment and chill future investment;⁸³ and
- uncertainty over the effects of unlicensed devices would devalue the MMDS/ITFS spectrum at a time when other rules are intended to increase value.⁸⁴

Only NAF asks the Commission to authorize an unlicensed underlay throughout the MMDS/ITFS spectrum band. Citing its own report to substantiate purported advances in radio

⁷⁷ See BellSouth Comments, pp.26-28.

⁷⁸ See, e.g., Ad Hoc MMDS Comments, pp.16-17; Blooston Comments, p.9; CTIA Comments, pp.5-6; Ericsson Comments, pp.9-13; Hardin Comments, p.7; IPWireless Comments, p.21; Motorola Comments, p.15; Comments of Nokia Inc. (“Nokia Comments”), pp.3-4; SCETV Comments, p.6; Sprint Comments, pp.8-10; Stanford/Northeastern Comments, pp.21-23.

⁷⁹ See, e.g., ComSpec Comments, p.2; Ericsson Comments, pp.9-13; Sprint Comments, p.10.

⁸⁰ See IMWED Comments, p.20.

⁸¹ *Id.* See also IPWireless Comments, p.21; Comments of Lucent Technologies (“Lucent Comments”), p.4; Motorola Comments, p.15; NITV Comments, p.9; Nokia Comments, p.4; Sprint Comments, pp.8-13.

⁸² See, e.g., Ad Hoc MMDS Comments, pp.16-17; Sprint Comments, p.15; Stanford/Northeastern Comments, pp.21-23.

⁸³ See EarthLink Comments, pp.13-14; IMWED Comments, p.19; NITV Comments, p.9; Sprint Comments, pp.12-13.

⁸⁴ See Ericsson Comments, pp.9-13.

technology,⁸⁵ NAF claims that “[n]ot allowing a low power underlay is like banning whispering at a football game, concert or other public forum. The whispering can occur simultaneously with the loudspeaker.”⁸⁶

These analogies are patently irrelevant and likely untrue. NAF offers no information on the effect of unlicensed devices on the noise floor, no information on the interference temperature contribution, no practical means to identify the source of interference, and no practical means to evaluate interference. More importantly, NAF fails to demonstrate that there is a shortage of unlicensed spectrum, fails to acknowledge that existing MMDS and ITFS licensees were granted exclusive rights to use their spectrum, and fails to appreciate that licensees have made and will continue to make investments following adoption of new rules in this proceeding.⁸⁷ In short, there is nothing in the record to suggest that the Commission should permit unlicensed operations in the 2500-2690 MHz spectrum band.

Indeed, even subjecting the MMDS and ITFS services to the notion of an unlicensed underlay introduces an air of uncertainty that could undermine the benefits that the new rules are intended to create. So long as the possibility of an untested underlay exists, it is likely that investment dollars will remain on the sidelines, business plans will be placed on hold and the MMDS/ITFS service will remain an unfulfilled promise. As all but one ill-informed commenter urge, the Commission should refrain from further considering the possibility that MMDS and ITFS licensees may share their licensed spectrum with unlicensed devices.

⁸⁵ See NAF Comments, p.22.

⁸⁶ *Id.* (footnote omitted).

⁸⁷ At a recent *ex parte* presentation, the Commission asked NAF to respond to several questions about its underlay proposal. See note 44, *supra*.

IV. THERE IS OVERWHELMING SUPPORT FOR ADOPTING A “SUBSTANTIAL SERVICE” LICENSEE PERFORMANCE REQUIREMENT.

In the *NPRM*, the Commission invited comment on the Coalition’s proposal to adopt a “substantial service” performance requirement for all MMDS and ITFS licensees, measured at the time of license renewal, with appropriate “safe harbors” to account for niche and specialized services.⁸⁸ A key element of this proposal is the granting of a renewal expectancy to licensees that provided “substantial service” during the license term, a standard that would take into account the service experience rather than a “snapshot” that measures service only at one point in time.⁸⁹ In this regard, the Commission noted that, as is the case in other services, a “substantial service standard affords maximum flexibility for authorization holders to offer a range of services and fosters competition.”⁹⁰

BellSouth and a large number of other commenters wholeheartedly support this view.⁹¹ Alternatives proposed by a few commenters would not solve the problems associated with the existing patchwork of rules,⁹² and would increase the administrative burdens on licensees and Commission staff. IPWireless and Grand Wireless each propose a series of milestones that would establish incremental coverage requirements.⁹³

⁸⁸ See *NPRM*, ¶¶190-198.

⁸⁹ See Coalition Comments, pp.91-94.

⁹⁰ *NPRM*, ¶191.

⁹¹ See BellSouth Comments, pp.31-33; Blooston Comments, pp.4-5; EarthLink Comments, p.9; HITN Comments, p.8; Independent MMDS Comments, pp.22-23; NITV Comments, p.8; Sprint Comments, pp.16-17.

⁹² The FCC’s current rules describe different performance requirements for BTA authorization holders, MMDS licensees and ITFS licensees. Under 47 C.F.R. §21.930(c)(1), BTA holders must construct MDS stations capable of reaching two-thirds of the applicable service area population (excluding populations within an incumbent MMDS station’s protected service area) within five years of grant of their authorization. Under 47 C.F.R. §21.43(a), site-based MMDS licensees must construct within 12 months of grant of an authorization. Under 47 C.F.R. §73.3534(a), site-based ITFS licensees must construct their facilities within 18 months of grant of an authorization.

⁹³ IPWireless proposes that commercial licensees (presumably holders of BTA authorizations and site-specific MMDS licenses) “maintain in continuous commercial service” a system that provides “adequate” service to at least one community within 36 months of the effective date of the order in this proceeding, at least one-third of the population of the licensee’s geographic service area within 48 months, and two-thirds of the population of the

These proposals, however, would merely replace one set of rigid requirements with another and should be rejected. They would require licensees to frequently prepare and file reports that would need to be reviewed by Commission staff under standards and definitions that are far from clear, and Commission staff inevitably would be burdened with extension requests, waiver requests and other requests for interim relief. As a result, licensees and operators may be reluctant to invest in a system if the Commission staff had not yet determined whether a licensee met a particular milestone, casting doubt on whether the next milestone could be met. More importantly, meeting specific population- or geography-based milestones would shift an operator's focus from developing the most effective business architecture to meet customer needs to inefficiently planning construction merely to preserve licenses – a result that creates the illusion, but not the reality, of providing public service.

Further, BellSouth supports two positions advanced by the Coalition. First, the Commission should extend the “substantial service” standard to existing licensees that filed extension requests prior to the Commission’s suspension of the construction requirements.⁹⁴ Taking such action would provide appropriate relief to those licensees that were unable to timely construct facilities because of the uncertainty that has surrounded the MMDS/ITFS industry. Second, the Commission should incorporate its Part 27 rules that permit licensees to suspend

licensee’s geographic service area within 60 months. Licensees that fail to meet these milestones would lose their spectrum rights. *See* IPWireless Comments, pp.23-24. Grand Wireless proposes that licensees in rural areas cover 30 percent of the population within two years, 50 percent within four years, 70 percent within six years and 80 percent within eight years. Licensees that fail to meet a milestone would be forced to partition the unused spectrum or unserved areas. Grand Wireless does not define “rural” for purposes of its proposal. *See* Grand Wireless Comments, p.14. NTCA agreed with BellSouth that the Commission should not impose “more stringent construction requirements just on rural areas as this would unfairly disadvantage small carriers.” NTCA Comments, p.7. *See also* BellSouth Comments, pp.33-35 (demonstrating growth of broadband services in rural markets in the absence of specific service obligations and noting unfairness of imposing such obligations on MMDS and ITFS but not other distribution networks). Other than Grand Wireless, no commenter proposed to create special service obligations on carriers that seek to provide service to rural areas.

⁹⁴ *See Order*, FCC 03-169, released July 10, 2003, ¶3 (confirming suspension of construction deadlines for ITFS and MMDS site-based licenses that had not expired as of the release date of the *NPRM*). As a result of the suspension,

service without subjecting licensees to license cancellation.⁹⁵ This rule change would reconcile disparate MMDS and ITFS rules,⁹⁶ and further provide opportunities for licensees to temporarily suspend service during a transition to advanced services, consistent with the flexibility embodied in the “substantial service” standard.

V. THE COMMISSION SHOULD PROMOTE ADDITIONAL FLEXIBILITY FOR ITFS LICENSEES.

A primary objective of this proceeding is to determine how ITFS licensees can use their spectrum to further their educational mission as the 2500-2690 MHz spectrum band is reconfigured to efficiently accommodate advanced wireless services. To create the appropriate balance between these twin aims, ITFS licensees as a whole must be afforded greater flexibility to individually determine how to operate in the new environment.

BellSouth believes that the Commission should take two important steps to promote this flexibility. First, the Commission should refrain from increasing the five percent minimum educational usage requirements for ITFS excess capacity leases to ensure that existing licensee/lessee relationships can continue with certainty. Second, the Commission should give ITFS licensees the right to sell their licenses to commercial entities to provide licensees with the opportunity to obtain consideration that could be used to support other educational needs and objectives. As the Commission stated in a previous proceeding, “we believe that current ITFS

holders of construction permits expiring after the release date do not need to seek extension of the construction period.

⁹⁵ To clarify a point made in its Comments, BellSouth supports the adoption of service-specific rules that would be consistent with those contained in Part 27 (as opposed to the more onerous requirements of Section 101). *See* BellSouth Comments, p.13,n.21. *See also* Coalition Comments, pp.132-135. BellSouth believes that the Part 27 model applied to other flexible use wireless services is appropriate here to enable licensees to react to market changes and accelerate the deployment of innovative services.

⁹⁶ *Compare* 47 C.F.R. §21.303 (elaborate notice and waiver procedures for MMDS licensees) *with* 47 C.F.R. §74.932(d) (simple one-year service suspension rule with no reporting requirements). *See also* Ad Hoc MMDS Comments, pp.22-24 (proposing to abolish 47 C.F.R. §21.303 service requirement); Independent MMDS Comments, pp.22-23 (same).

licensees are striving to fulfill [their educational] mission and that they should be permitted to obtain the maximum return from their licensed spectrum to further that mission.”⁹⁷

A. The Commission Should Not Increase The Five Percent Minimum Educational Use Requirement For ITFS.

One commenter, IMWED, proposes to decrease the flexibility that ITFS licensees currently enjoy by establishing a 25 percent minimum educational capacity requirement for data service and affording ITFS licensees an opportunity to recapture additional capacity for educational purposes.⁹⁸ According to IMWED, “this form of reservation insulates the public and the educational community from a licensee’s possible mistake in locking up spectrum for 15 years under a contract that designates a maximum of 5% of capacity for education, despite a growing need for more.”⁹⁹

BellSouth submits that the five percent minimum should not be raised just to ensure against an ITFS licensee’s “mistake” in negotiating a capacity lease agreement. But more importantly, to the extent an ITFS licensee has “a growing need for more” capacity, it currently has the right and ability to bargain for more capacity. To compel a licensee to have access to more capacity than it has negotiated would harm, not help, ITFS licensees. Operators would be less likely to lease spectrum, or would be required to lease from additional spectrum rights holders in order to have access to a sufficient amount of spectrum. Logically, if the operator has access to less spectrum, ITFS licensees would also receive less consideration. ITFS spectrum thus would be devalued and investment would be chilled.

⁹⁷ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Further Order on Reconsideration*, 15 FCC Rcd 14,566 ¶10 (2000) (permitting assignment of ITFS leases).

⁹⁸ See IMWED Comments, pp.8-9.

⁹⁹ *Id.*, p.9.

The Commission was faced with a nearly-identical issue when it adopted its two-way rules.¹⁰⁰ In that proceeding, operators and ITFS licensees agreed that a minimum of 20 percent of an ITFS licensee's capacity should be reserved for educational use. BellSouth objected to this proposal and proposed a five percent reservation that the Commission adopted in reliance on BellSouth's Reply Comments in that proceeding:

An operator that places video programming or other content on capacity that is subject to recapture does so at the risk that this capacity could be lost down the road, potentially resulting in an operational and customer relations nightmare that could have serious financial repercussions. A prudent operator either refrains from making substantial use of capacity subject to recapture, or factors these risks and uncertainties into such use. *Either way, capacity encumbered by recapture rights is inherently less valuable to the operator than unencumbered capacity, whether or not the ITFS licensee ever exercises its recapture rights.* As such, ITFS licensees necessarily will receive fewer benefits for encumbered capacity. . . . This situation will only be exacerbated if recapture time is substantially increased. . . . [T]he complicated terms [of the industry agreement] *would reduce the operational flexibility of educators and commercial operators, would redirect limited resources from more productive efforts and, in the end, would preclude parties from agreeing to terms that maximize desired benefits of ITFS and MDS partners.*¹⁰¹

This rationale holds true today, and is perhaps more relevant as the Commission endeavors to stimulate investment and trigger the development of a new advanced services platform. Many existing leases predicated on video or one-way data services will need to be re-negotiated. In some cases, the operator may desire to lease only the LBS or UBS spectrum assigned to the licensee, leaving a full 6 MHz in the MBS – 25 percent of the licensed spectrum – to the ITFS licensee for its own use.¹⁰² Or, recapture provisions similar to those suggested by IMWED may

¹⁰⁰ See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19,112 (1998), *recon.*, 14 FCC Rcd 12,764 (1999), *further recon.*, 15 FCC Rcd 14,566 (2000) (“Two-Way Order”).

¹⁰¹ *Id.*, ¶88 (emphases added) (footnotes omitted).

¹⁰² See GMU Comments, p.18.

be negotiated. But, in any event, the ability of an ITFS licensee to freely contract should not be abrogated by an artificial floor that may not be based on the realistic desires of the ITFS licensee. IMWED's proposal to reserve a minimum of 25 percent of ITFS capacity for educational use should not be adopted.¹⁰³

B. The Commission Should Permit ITFS Licensees To Have The Right To Sell Their Licenses To Commercial Entities.

The Commission asks whether ITFS licensees should have the right to sell their licenses to commercial “for-profit” entities.¹⁰⁴ In support, many commenters state that an ITFS licensee's decision to sell its license to a commercial entity affords the licensee flexibility to determine the best means for meeting the instructional and educational needs of its community.¹⁰⁵ They assert that spectrum leasing is a costly and inefficient artifice¹⁰⁶ that increases transaction costs and delays service deployment.¹⁰⁷ Certain commenters note that operators in rural markets would benefit from the ability to acquire, rather than lease, ITFS spectrum.¹⁰⁸

Commenters supporting retention of the *status quo* argue that commercial eligibility for ITFS would inappropriately apply market-based policies to an educational resource.¹⁰⁹ They also contend that such a change in the eligibility rules would constitute a *de facto* re-allocation of

¹⁰³ In contrast to the Commission's proposal that copies of leases be made available to the Commission on request, IMWED proposes that ITFS licensees be required to file unredacted copies of capacity leases with the Commission so that the public can “monitor . . . implementation” of the lease. IMWED Comments, p.10. This rationale is empty: it is up to the parties that negotiated and entered into the lease to monitor its implementation. Licensees should not labor under an unnecessary burden of a filing requirement, especially when the Commission is attempting to eliminate unnecessary regulations. See NPRM, ¶1.

¹⁰⁴ See NPRM, ¶116.

¹⁰⁵ See Sprint Comments, pp.23-24; EarthLink Comments, pp.10-11.

¹⁰⁶ See Comments of Adams Telcom, Inc., *et al.* (“Adams Comments”), pp.7-9.

¹⁰⁷ See Blooston Comments, pp.9-10.

¹⁰⁸ See Adams Comments, pp.7-9.

¹⁰⁹ See Comments of the Catholic Television Network and the National ITFS Association (“CTN/NIA Comments”), pp. 3,5 (noting that public interest spectrum set-asides have “unique value”).

ITFS,¹¹⁰ deprive educators from having a seat at the table on technology issues¹¹¹ and be unnecessary to promote ITFS in the secondary market.¹¹²

BellSouth has reviewed the Comments addressing the question of whether the Commission should eliminate restrictions on the ability of ITFS licensees to voluntarily sell their licenses to commercial entities.¹¹³ The views expressed by NITV, from its perspective as the holder of numerous ITFS licenses, are especially convincing in demonstrating that the flexibility of ITFS licensees to sell their licenses to commercial entities would promote investment and benefit education. NITV states as follows:

Open ITFS eligibility would unlock the full educational potential of ITFS spectrum by promoting the infusion of investment capital into ITFS that would accelerate the development and implementation of technology to promote educational ends.

* * *

Commercial operators must invest the necessary capital to develop a viable product attractive to customers. Changing the technical rules alone may not be enough to stimulate the capital investment necessary for this endeavor. Changing the eligibility rules to allow commercial companies to hold ITFS licenses may provide additional incentives necessary for companies to invest the needed dollar amounts in something that they themselves control. NITV believes that the *NPRM* affords the FCC an opportunity to implement rules that maximize incentives to invest in ITFS spectrum by promoting certainty in licensees' spectrum rights and reducing transaction costs associated with leasing spectrum. For example, NITV believes that the right to hold, rather than lease, a license for spectrum is a powerful incentive to investment and will facilitate the best and highest uses for this spectrum that will benefit education. Expanding eligibility would encourage new entrants who may be reluctant to build businesses using leased spectrum and increase the likely benefits to ITFS licensees by the broader availability of wireless systems that would result from a

¹¹⁰ See GMU Comments, pp.12-17; CTN/NIA Comments, p.5.

¹¹¹ See CTN/NIA Comments, p.7; IMWED Comments, pp. 3-6.

¹¹² See Comments of Education Community, pp.7-8; CTN/NIA Comments, pp.8-9.

¹¹³ See, e.g., NITV Comments, pp.3-7.

competitive secondary market for spectrum, balancing any potential harms.¹¹⁴

BellSouth is persuaded by arguments that affording ITFS licensees the right to sell their licenses to commercial entities would be consistent with the public interest and would afford additional flexibility for both ITFS licensees and operators seeking to develop new services to obtain meaningful benefits, without undermining the educational purpose of the ITFS service.¹¹⁵ Significantly, the decision to sell would be purely voluntary.¹¹⁶ Those ITFS licensees that choose to keep their licenses – or a portion of their licensed spectrum¹¹⁷ – could continue to do so with no change and without affecting the operations of other ITFS stations. Those ITFS licensees that choose to sell their licenses could realize negotiated benefits, such as cash consideration to fund other educational services, migration to other distribution systems¹¹⁸ and access to airtime for educational purposes, all in support of their overall educational mission.¹¹⁹

¹¹⁴ NITV Comments, pp.3-4 (footnote omitted).

¹¹⁵ The Commission also asks whether commercial entities should be eligible to participate in auctions for ITFS “white space.” See *NPRM*, ¶231. BellSouth agrees that commercial entities should be eligible to participate in ITFS auctions. See Region 10 Comments, p.14 (“if the Commission institutes a restructuring auction, Region 10 does not object to ITFS eligibility requirements being extended to MDS eligibles”). However, in the interest of fairness, commercial entities should not be eligible for auctions involving pending mutually exclusive ITFS applications, many of which have been pending since 1995. The number of contested applications is diminishing as a result of the applicants’ failure to prosecute pursuant to the Commission’s database audit and Commission decisions. See “Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS and MMDS Pending Legal Matters,” DA 02-2752, released October 18, 2002 (announcing audit of legal matters, including contested mutually exclusive ITFS applications); “Wireless Telecommunications Bureau Announces Action on Responses to Public Notice Regarding ITFS, MDS and MMDS Pending Legal Matters,” DA 03-638, released March 18, 2003 (dismissing with prejudice legal matters for which further processing was not requested).

¹¹⁶ Cf. Reply Comments of Huntsville City Schools, p.1 (incorrectly assuming that its capacity “will be significantly diminished” if the Commission permits acquisition of ITFS licenses by commercial entities) (emphasis added).

¹¹⁷ EarthLink has proposed that ITFS licensees be permitted to sell their LBS and UBS spectrum to commercial entities, and retain the 6 MHz in the MBS for legacy operations. See EarthLink Comments, pp.10-11. Because the MBS could be used for services other than legacy video operations, BellSouth believes that this proposal may limit an ITFS licensee’s flexibility.

¹¹⁸ BellSouth agrees with the Coalition that the Commission should amend 47 C.F.R. §78.13 to clarify that ITFS licensees are eligible to hold CARS licenses. See Coalition Comments, pp.144-145. Access to CARS spectrum would provide a low-cost alternative to existing ITFS video facilities, freeing up ITFS spectrum for advanced services while simultaneously maintaining continuity of video services.

¹¹⁹ See NITV Comments, pp.4-5 (“[t]he revenues realized from the sale of spectrum could form the basis to fund the ITFS licensee’s development of distance-learning materials, Internet projects or other educational programs/services. If an educator were to choose this option, it could, as it might today when leasing excess

VI. THE COMMISSION SHOULD NOT TERMINATE OR REQUIRE RENEGOTIATION OF EXISTING SPECTRUM CAPACITY LEASES.

Though the Commission did not present the issue in the *NPRM*, some commenters nonetheless suggest that the Commission terminate existing spectrum leases or require their renegotiation upon adoption of new rules in this proceeding.¹²⁰ Adopting this proposal would violate the APA,¹²¹ destroy negotiated value from existing arms'-length contracts and undermine confidence in the secondary market. The Commission should permit the negotiated terms of existing leases to control whether and to what extent a particular lease should be terminated, modified or remain intact.

Allowing lessors and lessees to address changes in rules and policies in the context of the existing lease would be consistent with precedent. In adopting its rules authorizing two-way services over MMDS and ITFS channels, the Commission specifically acknowledged that parties should have the flexibility to determine for themselves how to modify their relationship to ensure compliance with regulatory changes, stating that:

while we will continue to require certain provisions in excess capacity leases between ITFS licensees and wireless cable operators, and likewise will continue to prohibit certain provisions, we believe generally that ITFS licensees can -- and should -- in their negotiations with wireless cable operators arrange for lease terms that best protect their own individual interests and needs.¹²²

capacity, secure rights for free Internet access, obtain such access at reduced cost on its own behalf or on behalf of local educational affiliates, or fund other critical educational services or programs”).

¹²⁰ See Spectrum Market Comments, pp. 13-16 (proposing termination on date when service under existing rules is no longer permitted); Ad Hoc MMDS Comments, pp.25-27 (proposing to invalidate renewal clauses and to treat existing leases extending more than three years as “presumptively unlawful”); Independent MMDS Comments, pp.23-25 (proposing mandatory “good faith” negotiations between lessors and lessees that are “materially impacted” by the new rules).

¹²¹ As discussed in footnote 43, *supra*, the Commission would be violating the APA if it were to adopt proposals that are outside the scope of this proceeding. Moreover, although the Commission has required contracts to comply with certain regulatory policies, BellSouth questions whether the Commission has the authority to simply terminate contracts to which it is not a party.

¹²² *Two-Way Order*, ¶113. Moreover, parties are not prohibited from including lease provisions that require good faith renegotiation of certain provisions to comply with changes in rules. BellSouth is familiar with leases that contain such provisions.

There is no need for the Commission to deviate from this conclusion.

There are also practical and policy reasons why existing lease rights should not be compromised. As an existing operator, BellSouth has entered into capacity leases with numerous MMDS and ITFS licensees. Through the negotiation process, both parties to those agreements bargained for certain rights and accepted certain obligations, within the confines of the Commission's regulations and policies.¹²³ To perform on these leases, and in reliance on the expected long-term access to spectrum, BellSouth has made significant investments in system equipment, operations and the lessor/lessee relationship itself. The proposals to cut off these rights would strand this investment, thrusting BellSouth and its lessors into an uncertain environment – one in which it would have less spectrum to offer new and innovative services to the public and its lessors would have bare licenses with no assurance that they could be put to use to benefit education.¹²⁴ The impact of these market uncertainties would be felt in the investment community, which would lose confidence in the ability of a viable secondary market to develop.

In this regard, BellSouth fails to understand how existing leases would “hamper” the “new marketplace” or how the vacuum that would be created from the mandatory termination of spectrum leases creates “true value” for new services.¹²⁵ To the contrary, the terms of existing

¹²³ For instance, ITFS leases are limited to terms of 15 years and lessees are required to make certain equipment available to the ITFS lessor upon termination of the lease. *See Turner Independent School District*, 8 FCC Rcd 3153 (1993). Independent MMDS has asked the Commission to extend the *Turner* policy to MMDS. *See* Independent MMDS Comments, p.26. BellSouth opposes this position because it would require parties to existing leases to accept material terms that they did not negotiate. Further, BellSouth believes that the continuing applicability of the *Turner* policy should be considered in the context of the secondary markets proceeding, where the Commission has specifically requested comment on whether the policies adopted in that proceeding should be extended to the MMDS and ITFS services. *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113, released October 6, 2003, ¶¶307-308.

¹²⁴ *See* Gryphon Reply Comments, p.12 (noting Commission's recognition that long-term leases are necessary for operators to recover their investment). In this regard, PACE's proposal to limit ITFS capacity leases to five years must be rejected. *See* PACE Comments, p.6.

¹²⁵ Spectrum Market Comments, p.14.

leases, and the relationship that exists between contracting parties, create the environment by which new services can be delivered, either through lease provisions that are already sufficient or through new terms that the parties voluntarily negotiate.

Conclusion

In light of the foregoing Reply Comments and its earlier-filed Comments, BellSouth Corporation and BellSouth Wireless Cable, Inc. urge the Commission to take the following actions in this proceeding:

- Adopt the MMDS/ITFS spectrum rebanding plan proposed by the coalition of MMDS and ITFS interests;
- Implement geographic area licensing and streamline application procedures;
- Retain open eligibility rules to enable DSL providers to hold and acquire MMDS and ITFS spectrum rights;
- Maintain its prohibition on unlicensed use of MMDS and ITFS channels;
- Extend the MMDS BTA build-out period to coincide with the end of the BTA license term and adopt a “substantial service” standard with appropriate “safe harbors;” Permit market forces to determine deployment of advanced wireless services to rural areas;
- Facilitate additional flexibility for ITFS licensees by not increasing the five percent minimum educational reservation;
- Permit commercial entities to be eligible to hold licenses for ITFS spectrum; and
- Refrain from terminating existing MMDS and ITFS capacity leases or requiring their renegotiation.

Respectfully submitted,

**BELLSOUTH CORPORATION and
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October 23, 2003

